of a previous indictment on the same facts. *People* v. *Gluckman*, 60 App. Div. 307, 70 N. Y. Supp. 173. *Cf. Commonwealth* v. *Willcox*, 111 Va. 849, 69 S. E. 1027; *Bowman* v. *Commonwealth*, 146 Ky. 486, 143 S. W. 47. See 2 VAN FLEET, RES JUDICATA, 1242. These decisions are based on the fact that there had been no former jeopardy, for the defendant had not yet been put on trial upon any issues of fact. *Cf. Taylor* v. *United States*, 207 U. S. 120; *People* v. *Stanton*, 84 Misc. 101, 146 N. Y. Supp. 862. In civil actions such a judgment would however operate as *res judicata*. *Gould* v. *Evansville, etc. R. Co.*, 91 U. S. 526, 534. *Contra*, *State of Arkansas* v. *Gill*, 33 Ark. 129, 132. But the application of this doctrine to criminal law is apparently new. Nothing under that name, distinct from former jeopardy, has been hitherto recognized. At most the term has been used to extend the doctrine of former jeopardy to summary proceedings. *Cf. Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378, 381. But former jeopardy is only a variant of the same fundamental principles of justice and expediency that lie behind *res judicata*. See *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378, 381. Yet jeopardy sufficient to create a defense to subsequent action is generally only reached subsequent to judgments on the pleadings. *Cf. Taylor* v. *United States*, *supra; Kepner* v. *United States*, 195 U. S. 100, 128. As there is no basis for this failure to protect a criminal after a judgment on a demurrer or plea to the indictment, it seems but equitable to apply the doctrine of *res judicata* to fill the gap. The result of the principal case has been reached by statutes in a number of states. *Cf. Ex parte Hayter*, 154 Cal. 243, 116 Pac. 370, with *State* v. *Fields*, 106 Iowa 406, 76 N. W. 802.

POWERS — SPECIFIC PERFORMANCE — ENFORCEMENT OF CONTRACT TO EXERCISE GENERAL TESTAMENTARY POWER OF APPOINTMENT. — The donee of a general power of appointment to be exercised by will contracted to exercise it by an irrevocable will in favor of the promisee. At the same time he signed a will in accordance with the contract. He later made a new will revoking the former and leaving the property to others. Suit is brought after his death. *Held*, that the contract will not be specifically enforced. *Farmers' Loan & Trust Co.* v. *Mortimer*, 114 N. E. 389 (N. Y.).

Where the owner of property contracts to devise it, specific performance is regularly granted and enforced by imposing a constructive trust on the property in the hands of those to whom it has come at law. *Emery* v. *Darling*, 50 Ohio St. 160, 33 N. E. 715. A general power of appointment is often considered to approximate absolute ownership. See 24 HARV. L. REV. 654. Thus where the mode of execution is unrestricted, a contract to appoint is in equity deemed equivalent to actual appointment. *Johnson* v. *Touchet*, 37 L. J. Eq. 25; *In re Jennings*, 8 Ir. Ch. 421. But a distinction should be made when necessary to fulfill the donor's intention. Now the very purpose of making a power exercisable by will only is to provide freedom of appointment until the donee's death. An irrevocable contract destroys this freedom. Specific performance of it should therefore not be allowed to defeat the rights of those claiming under an exercise of the power as contemplated by the donor. Thus in default of appointment, those entitled under the provisions made by the donor should take over those with whom the donee has contracted. See *Reid* v. *Shergold*, 10 Ves. Jr. 370, 379. So also those prevail who claim under an authorized exercise of the power, although in violation of the contract, and specific performance is not granted. *In re Parkin*, [1892] 3 Ch. 510; *Wilks* v. *Burns*, 60 Md. 64. *Cf. Reid* v. *Boushall*, 107 N. C. 345, 12 S. E. 324. In the case of a special testamentary power it has been held that not even may damages be recovered at law, the contract being considered illegal and void. *In re Bradshaw*, [1902] 1 Ch. 436. See *Palmer* v. *Locke*, 15 Ch. D. 294, 300. This result may be supported on the ground that the power was created primarily for the benefit of a class, to which the donee owes a fiduciary duty, in the nature of a trust, to do nothing in vio-

lation of the creator's intention. But where the power is general, there is no reason, as regards the donee alone, why he should not be liable on his promise. Damages may therefore be recovered against his estate. *In re Parkin, supra.*

QUASI-CONTRACTS — RIGHTS ARISING FROM MISTAKE OF FACT — RECOVERY FOR BENEFITS CONFERRED UNDER A CONTRACT WITH AN UNAUTHORIZED AGENT. — Plaintiff agreed with the defendant's general manager to make certain improvements on defendant's land in return for a twenty-year lease of the land. The manager had no authority to make such a contract. After the plaintiff had been working on the improvements for about five months, evidently with the defendant's knowledge, defendant offered to give plaintiff a lease for ten years, but no longer. Plaintiff quit work, and sues for the value of the improvements already made. *Held*, that the plaintiff recover. *Underhill* v. *Rutland R. Co.*, 98 Atl. 1017 (Vt.).

At one time liability in quasi-contract was thought to be based on a form of implied contract. See WOODWARD, QUASI-CONTRACTS, § 4. If this were true, it is obvious that no recovery could be had for services rendered under a void contract, for the contract itself must rebut any inconsistent implication. See dissenting opinion of Ingraham, J., in *Lyon* v. *West Side Transfer Co.*, 132 App. Div. 777, 117 N. Y. Supp. 648. It is a survival of this idea of implied contract which causes some courts to hold that the defendant must knowingly receive the benefits in order to be liable in quasi-contract. *Spooner* v. *Thompson*, 48 Vt. 259; *Kelley* v. *Lindsey*, 7 Gray (Mass.) 287. *Cf. Otis* v. *Inhabitants of Stockton*, 76 Me. 506. But if the benefits of a contract made by an unauthorized agent were knowingly received, it would usually amount to a ratification of the agent's contract. See MECHEM, AGENCY, 2 ed., §§ 434, 436, n. 16. The true basis of liability in quasi-contract is that the defendant has received a benefit from the plaintiff which it would be inequitable for him to keep; it does not rest on any real contractual obligation whatever. KEENER, QUASI-CONTRACTS, 19. One who receives the fruits of a contract made by an unauthorized agent should therefore be liable irrespective of his knowledge of the transaction, if actually benefited thereby, and it is usually so held. *Reid* v. *Rigby*, [1894] 2 Q. B. 40; *Leonard* v. *Burlington, etc. Ass'n*, 55 Iowa 594, 8 N. W. 463. *Cf. Van Deusen* v. *Blum*, 18 Pick. (Mass.) 229. But *cf. Bond* v. *Aitkin*, 6 Watts & S. (Pa.) 165. In the principal case there was considerable evidence that the defendant knowingly received the benefits of its agent's contract, so that it might well have been held to have ratified it. *Cf. Clark* v. *Hyatt*, 118 N. Y. 563, 23 N. E. 891. But if such is not the case, the recovery in quasi-contract is clearly justified. *Hawkins* v. *Lange*, 22 Minn. 557; *Werre* v. *Northwest Thresher Co.*, 27 S. D. 486, 131 N. W. 721; *Henrietta National Bank* v. *Barrett*, 25 S. W. 456 (Tex.).

SALES — TIME OF PASSING OF TITLE — MISTAKE AS TO WHOM GOODS ARE INTENDED FOR. — Seller was owner of 1000 bushels of oats lying in a ship in the harbor. He sold 500 bushels to the plaintiff and 500 to the defendant. Both the plaintiff and the defendant hired the same lighterman, X., to bring their grain to shore. X. got 500 bushels in one of his boats, which he took for the defendant; but the seller intended this grain for the plaintiff, and made out his papers accordingly, one of which, in the nature of a consignment, was delivered to X. but X. did not open it. This load was delivered to the defendant and appropriated by him. X. got the remaining 500 bushels in another boat and the converse mistake occurred. This boat was sunk. The plaintiff sues for the first load of grain. It was found as a fact that neither the seller nor X. was negligent in making the mistake. *Held*, that title to the first load passed to plaintiff. *Denny* v. *Skelton*, 115 L. T. R. 305.

According to the English law, where the goods are part of an undivided mass